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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-648

RAMON D'EUGENIO,

Petitioner,

-against-

SLATTERY CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

RAMON D'EUGENIO,

Petitioner,

-against-

SLATTERY CONSTRUCTION CO., INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York dated July 7th 1971. Time to file this petition has been extended to November 12, 1971 by Order of this Court dated October, 12, 1971.

OPINION BELOW

The only opinion written was by the Supreme Court of the State of New York, County of Richmond. This memorandum opinion is unreported but appears in full in the appendix of this petition.

JURISDICTION

The Court of Appeals for the State of New York denied appellant's motion for leave to appeal on the 7th day of July,

1971. A copy of the Court's order is annexed as part of the appendix.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTION PRESENTED

Did the Trial Court fail to consider and properly interpret Section 241 of the Labor Law, as amended in 1962, as the controlling law?

Where a State statute is enacted for the express purpose of providing protection to persons, lawfully at or about an excavation which is inherently dangerous, may the Trial Court summarily discriminate between employees of sub-contractors, employees of the general contractor, and members of the public where the statute specifically provides protection for all persons without distinction in personal injury claims against the general contractor?

REASON FOR GRANTING THE WRIT

The manner of the interpretation of Section 241 of the Labor Law is repugnant to the Constitution, Treaties and Laws of the United States and it violates uniformity of decision as applicable to citizens of the United States injured under identical circumstances.

STATEMENT

Petitioner was an employee of the Post Construction Company (hereinafter referred to as Post) a subcontractor of the respondent, general contractor, Slattery Construction Co. Inc., (hereinafter referred to as Slattery).

Petitioner was engaged in digging deep trenches for the purpose of laying sewer lines in the various approaches to the Verrazano Bridge in Staten Island, at the area known as Clove Lake Expressway, west of Manor Road, Staten Island. This operation had been going on approximately two years prior to the accident and the trenches had been dug with the same disregard to the safety of the workmen as existed at the place and the time of this accident, namely, on the 27th day of September, 1963, in an inherently dangerous manner in violation of Section 241 of the Labor Law of the State of New York as amended and effective October 1, 1962.

Proof of inherent danger was based on the fact that the trench in question was such that there was an ever present risk of it caving in as a consequence of the depth, width and length of the trench, and the absence of proper shoring or other means to protect the sides from caving in.

POINT I

THE COURT BELOW WAS REQUIRED TO RECOGNIZE SECTION 241 OF THE LABOR LAW, AS AMENDED, EFFECTIVE OCTOBER 1, 1962, AS THE LAW OF THE CASE.

As amended, Section 241 of the Labor Law, improved the existing industrial safety standards by extending the protection formerly provided to workers engaged in excavations in conjunction with building construction work to include excavation workers engaged in highway construction projects.

Prior to the 1962 amendment, Section 241 of the Labor Law read as follows:

"Sec. 241. Protection of employees on building construction or demolition work including excavation work in connection therewith."

The amendment was a substantial change from the prior section 241, as noted in the historical note at the bottom of page 307 of McKinney's Consolidated Laws of New York, Annotated, Book 30: *1 - *2 - *3

*1. The distinction was brought about by virtue of an excavation that gave way upstate where the subcontractor had violated the instructions of the New York State Labor Department Inspector and a week later the excavation caved in. The excavation was on a roadway without reference to any building or structure. Authority for the foregoing statement is the New York State Legislative Annual for 1962, pages 217, 218.

*2. Industrial safety S.I. 1223, Pr. 1233, Laverne Ch. 450 "LABOR LAWS, Sections 200, 240; Sections 241, 256, repeal; Section 241, new. The purpose of the bill is to improve existing safety standards in the Labor Law by providing protection to employees and the public in open areas, and by strengthening enforcement procedures."

*3. Section 241 of the Labor Law is repealed and under a new Section 241 safety standards will apply to excavation workers even though the excavation work is not in connection with a building or structure."

Section 241 of the Labor Law as amended, October 1, 1962, reads as follows:

"Section 241. CONSTRUCTION, EXCAVATION AND DEMOLITION WORK.

All areas, buildings or structures in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated

and conducted by the owners, contractors, and subcontractors as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this section. Added L. 1962, c. 450, Section 3, eff. Oct. 1, 1962."

The protection intended was clearly expressed by Senator Laverne; S. I. 1223 Pr. 1233, Laverne Ch. 450.

The bill provided important and necessary improvements in existing safety standards; and, extended protection to highway excavation workers not specifically covered by the standards existings nior to the 1962 amendment of Section 241 of the Labor Law.

It was intended by the amendment that in addition to statutory liabilities, the respondent having the authority to prohibit statutory violations in the performance of the work involved in the overall plan of construction would be liable for any approval of unsafe, negligent, or unlawful practice of sub-contractors resulting in injuries to all workers or employees involved therein including the public generally.

The failure of the general contractor to act or exercise control of the excavation work under such inherently dangerous circumstances to safeguard workers from the dangerous practice of sub-contractors was to be considered to constitute a violation of the statute.

Rosenberg v. Schwartz, 260 N.Y. 162

Ramsey v. National Contracting Co., 49 App. Div. 11: 269 N.Y. 219

Haefeli v. Woodrich Engineering Co., 255 N.Y. 442

Hooey v. Airport Construction Co., Inc., 253 N.Y. 486-490

Griffen v. Manice, 166 N.Y. 188

Sherida.. v. Rosenthal, 206 App. Div. 279

Berg v. Parsons, 156 N.Y. 109

The law is well settled that a party having the power to take necessary precautions and failing to do so is liable for the consequences of a foreseeable accident.

Lotocka v. Elevator Supplies Co. et al 246 N.Y. 296

Besner v. Central Trust Co., 230 N.Y. 357

Mullen v. Rickwood Sprinkler Co., 57 N.Y. 567

DeHaen v. Rickwood Sprinkler Co., 248 N.Y. 350

Statutory provisions have been enacted to prevent the happening of an accident as in the instant case, therefore, the cavein of the trench is a basis for the presumption that it was due to negligence.

Mullen v. St. John, supra

Rosenberg v. Schwartz, supra

Hardie v. Boland Co., 205 N.Y. 336

Lotocka v. Elevator Supplies Company, et al, supra

Slater v. Barnes, 241 N.Y. 284

Petluck v. McGolrick Realty Co., Inc. 240 App. Div. 61

The duty of Slattery to provide a safe place to work was nondelegable under section 241 of the Labor Law as amended and in effect October 1, 1962.

The revised statute was inteded to safeguard all persons employed or lawfully frequenting areas of construction and excavation without distinction, including the public in open areas.

The decision by the Trial Court which was affirmed by the Court below was cearly erroneous in that it was based on the provisions of Section 241 of the Labor Law, prior to its amendment and the legal precedents relied upon by the Court were all prior to the amendment of Section 241 as aforesaid, and, therefor inapplicable.

The decision of the Court below seems to be in conflict with decisions in other jurisdictions as well. *Matanuska Electric Association v. Johnson,* 386 P. 2d 700 (1963); *Caporale v. Blakeslee & Sons,* 175 A. 2d 565 (1961); *Majestic Realty Ass. Inc., v. Toti Contracting Co.,* 153 A. 2d 327 (1959).

CONCLUSION

It is respectfully submitted that the questions raised by appellant merit consideration by this Honorable Court, as the rights and duties of all employers and employees engaged in construction require further and precise judicial clarification.

MEMORANDUM OF SAMUEL LEIBOWITZ, J.S.C.

SUPREME COURT – RICHMOND COUNTY

RAMON D'EUGENIO

-against-

SLATTERY CONSTRUCTION CO., INC.

Appearances:

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New York, N. Y. 10038

JOHN P. CONNORS, ESQ.
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New York, N. Y. 10005

Personal injury action.

The alleged accident occurred on September 27, 1963, at Clove Lakes Expressway, Staten Island, N. Y. Plaintiff was in the employ of Post Construction Co. ("Post"), a subcontractor of Slattery Construction Co., Inc. ("Slattery"), the general contractor. The work involved the installation of drain pipes under the roadbed. Plaintiff, while digging in a trench, was injured when the walls of the trench collapsed.

Plaintiff alleged that Post, his employer, negligently performed the excavation work below the surface of the roadbed, in violation of the Labor Law and/or the Rules of the

Boards of Standards and Appeals of both the State and City of New York. Post was not sued because employees are limited to workmen's compensation, for injuries received while at work, as against their employers. He, therefore, sued Slattery, the general contractor, claiming it to be responsible. He alleged that Slattery, as general contractor, negligently failed to provide safe place to work; to properly supervise the work of the subcontractor; and to require the subcontractor to perform in accordance with the Labor Law and the rules of the Board of Standards and Appeals and of the ordinances of the City of New York.

After hearing the proof of court finds that Slattery exercised no control over the work of Post (*Uppington v. City of New York*, 165 N.Y. 222)/ Post was an independent contractor and Slattery not obligated to protect Post's employees (*Zucchelli v. City Constr. Co.*, 4 N.Y. 2d 52, 56; *Wohlfron v. Brooklyn Edison Co.*, 238 App. Div. 463, 466, aff'd 263 N.Y. 547); the work was not dangerous or unsafe (*Chancy v. N.Y.C. Transit Auth.*, 12 A D 2d 61, aff'd 10 N Y 2d 871); the equipment, methods and work spaces were the sole responsibility of Post as an intimate detail of the job (*Cangiano v. Lo Bosco*, 23 A D 2d 860; *Curtis v. State*, 27 A D 2d 628) and that the injury arose through the negligence of Post as a detail of the work (*Wright v. Belt Assoc.*, 14 N.Y. 2d 129).

It is further found that Slattery did not become a co-tort feasor by agreeing to share with Post any saving effected in the cost of blasting and drilling, nor did Slattery confirm or ratify Post's performance of its duties.

Based on both the law as set forth herein and the facts as found, there is no liability for plaintiff's injuries imposed upon the defendant.

Accordingly the defendant's motion to dismiss for failure to prove a prima facie case is granted.

The foregoing shall constitute the decision of the court under section 4213(b) of the CPLR.

Submit judgment on notice.

s/ Samuel Leibowitz
J.S.C.

ORDER DENYING MOTION TO APPEAL

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July, A.D. 1971.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, Presiding.

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2 Mo. No. 574
Ramon D'Eugenio,

Appellant,

vs.

Slattery Construction Co., Inc.

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

s/Gearon Kimball
Deputy Clerk

Order on Appeal from Judgment

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1971

HON. SAMUEL RABIN, *Presiding Justice*
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST *Associate Justices*
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN

Ramon D'Eugenio,
Appellant,
v.
Slattery Construction Co., Inc.,
Respondent.

In the above entitled cause, the above named Ramon D'Eugenio, plaintiff, having appealed to this court from a judgment of the Supreme Court, Richmond County, dated August 19, 1969; and the said appeal having been argued by Jacob Rassner, Esq., of counsel for appellant and submitted by Patrick J. Hughes, Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof; it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter: HERMAN M. POGUL
Clerk of the Appellate Division